SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1283

STATE ex rel. WILMER RHODES, *Appellant*

vs.

GRANT K. COOK, *Appellee.*

On Appeal from the Supreme Court of the State of Washington

JURISDICTIONAL STATEMENT

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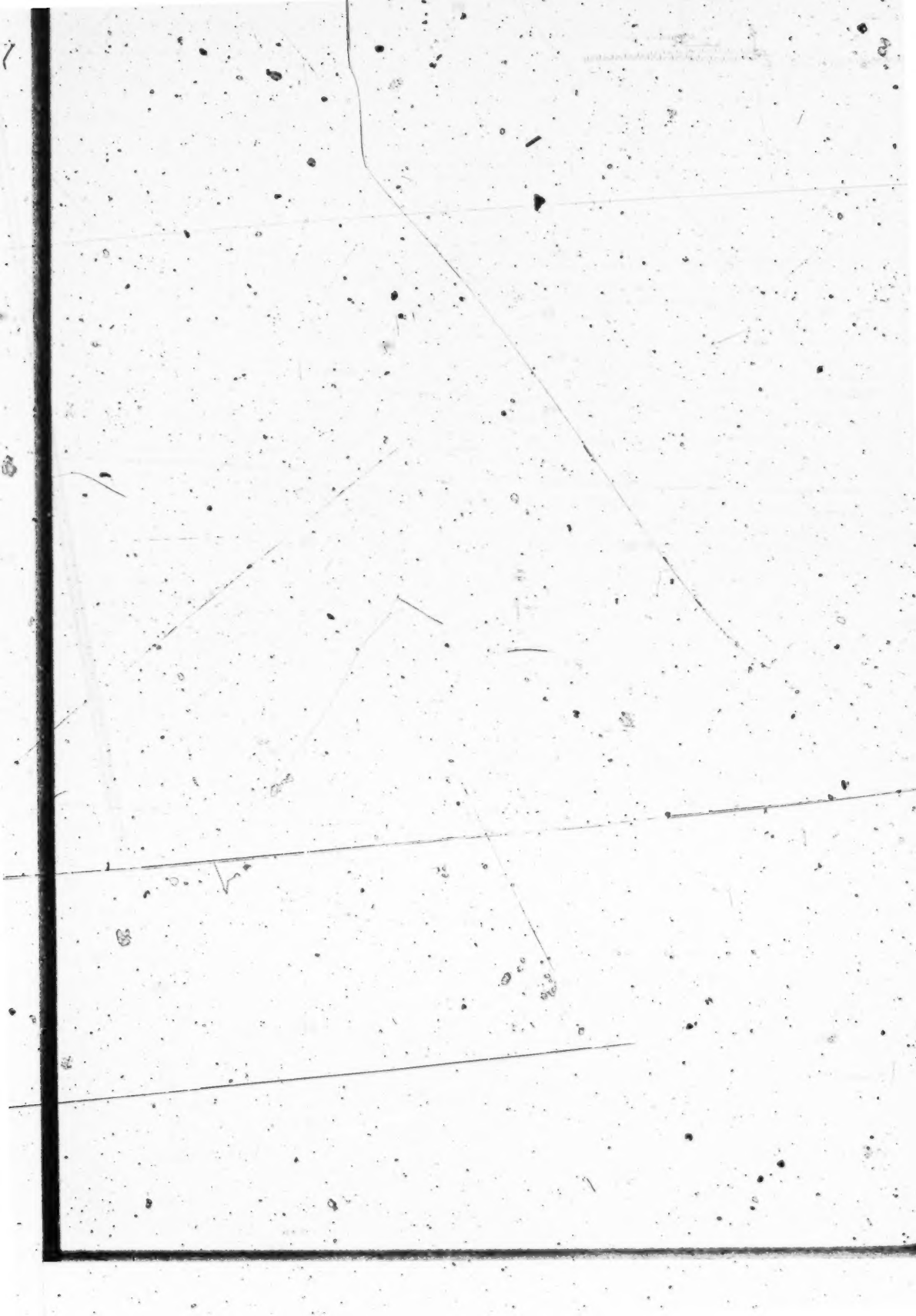

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington, is reported in 72 Wash. 2d 431, 433 P.2d 677, and is set forth in the appendix to this Jurisdictional Statement. (pp. 1a to 10a). The opinion of the Superior Court of the State of Washington for Snohomish County is not reported and is set forth in the appendix to this Jurisdictional Statement. (pp. 13a to 16a).

JURISDICTION

Appellant, Wilmer Rhodes, brought this action seeking a mandamus writ in the Superior Court of the State

of Washington for Snohomish County to compel Appellee, Grant K. Cook, Administrative Authority, Snohomish County Plumbing Code, to issue a permit to appellant to allow him to fix up the plumbing in a single-family dwelling owned by him, but which he did not intend to occupy. Appellant alleged that the Plumbing Code, by prohibiting the issuance of a permit to him, violated his rights under the Constitution of the State of Washington and the Fourteenth Amendment to the Constitution of the United States. The opinion of the Supreme Court of the State of Washington was entered on November 9, 1967. Appellant timely filed a motion for rehearing, which was denied by the Supreme Court of the State of Washington on January 3, 1968, making its opinion of November 9, 1967 a final judgment on January 3, 1968. Notice of Appeal was filed by the appellant in the Supreme Court of the State of Washington on March 19, 1968. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(2). *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928). *Kotch v. Board of River Pilot Commissioners for the Port of New Orleans*, 330 U.S. 552 (1947). *Zschernig v. Miller*, 399 U.S. 429 (1968).

STATUTE INVOLVED

This appeal involves the Snohomish County Plumbing Code adopted January 22, 1962, as amended Janu-

ary 28, 1963—Exhibit 4 to the Statement of Facts. The particular provision of the Code challenged on this appeal is Code §§ 1.10(a) and (c) which provide as follows:

> "§ 1.10 To Whom Permits May Be Issued
>
> "(a) No permit shall be issued to any person to do or cause to be done any plumbing or drainage work regulated by this code, except to a person holding a valid unexpired and unrevoked Plumbing Contractor's Certificate of Qualification or Registration as required by Section 2.3, except when and as otherwise hereinafter provided in this section.
>
> * * * *
>
> "(c) Any permit required by this code may be issued to any person to do any plumbing or drainage work regulated by this code in a single-family dwelling used exclusively for living purposes, including the usual accessory buildings and quarters in connection with such buildings in the event that any such person is the bona fide owner of any such dwelling and accessory buildings and quarters, and that the same are occupied by or designed to be occupied by said owner, provided, that said owner shall personally purchase all material and shall personally perform all labor in connection therewith."

Other pertinent provisions of the Code are set forth in the Appendix, pp. 35a to 40a.

QUESTIONS PRESENTED

1. Does the Snohomish County Plumbing Code vio-

late the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by unjustly discriminating against a non-occupying owner of a single-family dwelling in requiring that he apply for and obtain a Plumbing Contractor's Certificate by passing an examination and paying a license fee in order to engage in plumbing work in the dwelling which he owns, while permitting an occupying home owner to do plumbing work in his home without being required to obtain such a Certificate, where the Code also requires that any plumbing done is subject to comprehensive inspection by the authorities to insure that it meets the requirements of this Plumbing Code?

2. Does the Snohomish County Plumbing Code offend the due process clause of the Fourteenth Amendment to the Constitution of the United States by compelling a property owner willing to comply with all Code requirements which ensure safe and healthy plumbing to take a test, pay a fee and become licensed in the same fashion as a commercial plumber in order to plumb his own property which he does not occupy?

STATEMENT

In 1961, the Master Plumbers' Association of Everett, Washington, (the county seat of Snohomish County) formed a code committee and successfully petitioned the Snohomish County Commissioners to pass a Plumb-

ing Gode. The Commissioners adopted as the County's Plumbing Code the 1961 edition of the Uniform Plumbing Code of the Western Plumbing Officials Association.

The Code provides a comprehensive system of regulation for all "plumbing" within the County. Plumbing is defined by the Code as "the business, trade or work having to do with the installation, removal, alteration, or repair of plumbing and drainage systems or parts thereof." In order to conduct plumbing work, with a very limited exception for certain specified kinds of repair work which do not require replacement or rearrangement, (see § 1.9, Appendix, p. 36a), a permit is required. (§ 1.8, Appendix, p. 36a). Permits are only issued after submission of an application with plans, approval of the plans and payment of a work permit fee. (see § 1.11, Appendix, pp. 37a). A comprehensive system of inspection, testing and approval of work, fixtures and materials is prescribed to insure that Code requirements are met.

The particular provision of the Code which is the subject of this appeal concerns the limitations on persons to whom permits may be issued. (§ 1.10, *supra*). Under this section, permits may be issued only to "persons holding a valid unexpired and unrevoked Plumbing Contractor's Certificate of Qualification or Registration" with one exception set forth in section 1.10 (c).

The exception allows the owner of a single-family dwelling who meets certain specific requirements to secure a permit if the dwelling is "occupied by or designed to be occupied by said owner."[1]

The appellant purchased a single-family dwelling which he intended to fix up and rent. He applied for a permit pursuant to section 1.10 (c), but was denied the permit on the sole ground that he did not occupy or intend to occupy the dwelling. Appellant complied or will comply with requirements for a permit except that of occupancy of the house; and as a result of the plan approval and inspection requirements of the Code, it is clear that the work would fully meet Code standards.

Appellant filed an application for a writ of mandamus with an affidavit in support thereof which set forth his contention that the Plumbing Code insofar as it prevented the issuance of a plumbing permit to him constituted a violation of his rights under the Fourteenth Amendment of the Constitution of the United States and the comparable provisions of the Constitution of the State of Washington.[2] After trial, his applica-

1. The six specific requirements for meeting the exception are set forth in the opinion of the Supreme Court of the State of Washington, (Appendix, p. 2a) According to the Code, an owner of a single-family dwelling may do his own plumbing work provided the dwelling is occupied by him or designed to be occupied by said owner and five other pre-conditions are satisfied. Appellant admittedly does not meet the first proviso but does comply with the latter five conditions.

2. Petitioner contended that section 1.10(c) of the Code:

"violates Amendment XIV of the United States Constitution . . . by imposing unnecessary, discriminatory, arbitrary, oppressive and unreason-

tion was denied by a judge of the Superior Court of the State of Washington for the County of Snohomish, and the findings of fact and conclusions of law entered by the Superior Court reflect the court's decision that the Code provision was valid despite the question having been raised under the Fourteenth Amendment to the Constitution of the United States.[3]

On appeal to the Supreme Court of the State of Washington, specifically assigning as error the conclusions of law of the lower court sustaining the validity of the Code and holding that it was not repugnant to the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and the Washington State Constitution, a department of the court first heard argument and then referred the case to the court *en banc*, where the case was again reargued.

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able restrictions upon petitioner's lawful right to carry on private business on his property, and by denying to petitioner equal protection under the Law."

Finding V of the Findings of Fact and Conclusions of Law of Superior Court, (Appendix, p. 19a). See also Affidavit in Support of Application for Writ of Mandamus, R. p. 0023.

3. The Superior Court concluded (Appendix, p. 23a):

"V

"Section 1.10(c) of said UNIFORM PLUMBING CODE does not deprive petitioner of life, liberty or property without due process of law as provided by Amendment XIV, Section I, of the United States Constitution and Article I, Section III, of the Washington State Constitution.

"VI

"Section 1.10(c) of said UNIFORM PLUMBING CODE is a reasonable classification and does not deny to petitioner equal protection of the laws as is provided for by Amendment XIV, Section I, of the United States Constitution and Article I, Section XII, of the Washintgon State Constitution."

The Supreme Court, by a six-to-three vote, affirmed the decision of the Superior Court. The majority opinion rejected appellant's argument that section 1.10(c) of the Code violated his rights under the equal protection clause of the Fourteenth Amendment on the ground that it was "reasonable to assume" that resident home owners will tend to perform plumbing work more carefully than the nonresident owner of a single-family dwelling. Based on this assumption, the court found that it was reasonable to require a nonresident home owner to obtain a Plumbing Contractor's Certificate, while not requiring that a resident home owner acquire such a certificate. Appendix, pp. 6a, 7a.

This assumption that the court made had no basis whatsoever in the record compiled in the trial of the case. It undoubtedly arose because of the court's view that "There is a presumption that facts justifying a regulation exist if such facts reasonably can be presumed." Appendix, p. 3a.

The court rejected appellant's argument that the Code violated his rights under the due process clause of the Fourteenth Amendment, holding that the requirement that a nonresident home owner be required to obtain a Plumbing Contractor's Certificate was reasonably related to the public health and safety and was a valid exercise of the police power. It based this conclusion upon the reasoning that a property owner who

does plumbing on his single-family dwelling that he intends to rent "has a similar impact upon the public to a commercial plumber." Appendix, p. 4a. Such individual, the court said, is to some extent carrying on a commercial activity since plumbing is an integral part of the property that he intends to rent or sell.

While recognizing that by reason of the inspection requirements of the Code, plumbing work would meet the standards of the Code no matter who did the work, the court nevertheless concluded that a requirement that "commercial plumbers who hold themselves out for hire" be licensed was "reasonably related to the public health and safety."[4]

The dissenting opinion pointed out that the majority opinion did not follow the trial court's rationale.[5] Responding to the majority assumption that plumbing done in dwellings occupied or designed to be occupied by the owner would result in a more careful job, the dissent emphasized that there could be no threat to public health or safety by allowing appellant to perform

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4. This requirement was not at issue in the case. Appellant conceded the propriety of the licensing requirements being applicable to plumbing contractors or plumbers who hold themselves out for hire. Appellant objected only to having to become a plumbing contractor or commercial plumber in order to do plumbing work on the single-family house which he owned.

5. The Superior Court based its analysis and conclusions on the theory that the occupancy requirement "prevents subterfuge and provides protection from a person taking ownership of property for the purpose of being able to plumb it himself without having to meet the licensing requirements of the Code . . ." Appendix, p. 16a. The dissenting opinion in the Supreme Court pointed out that there was "no requirement that a resident owner continue to live in his house for any particular length of time." Appendix, p. 8a.

plumbing work on his house as the evidence in the case showed that inspection would "insure compliance with the technical requirements of the Code whether the work be done by a resident or a nonresident" (Appendix, p. 9a). The dissenting opinion concluded that the occupancy requirement had no "logical bearing on whether the work will pass inspection," and no "logical connection with the object sought to be accomplished by the ordinance—the protection of public health and safety." Appendix, p. 9a.

THE QUESTIONS ARE SUBSTANTIAL

The Uniform Plumbing Code in question is the handiwork of the Western Plumbing Officials' Association. From this league the Snohomish Plumbers Association obtained the Code at bar and persuaded the county authorities to adopt it with insignificant changes. This Code serves the association's purposes well. It grants to the commercial plumbing family—plumbing contractors, master plumbers and journeyman plumbers—a monopoly over every phase of plumbing activity in the county with one exception. Six conditions must be met to qualify for this exemption.[1] Appellant Rhodes complies with five of these six conditions. The one con-

1. The six conditions are: (1) The plumbing must be done in a single-family dwelling; (2) the dwelling must be used exclusively for living purposes; (3) the person doing the work must be the bona fide owner thereof; (4) the owner must personally purchase all materials and (5) personally perform all labor in connection therewith; (6) the dwelling shall be occupied by or designed to be occupied by said owner.

dition that he does not meet is that the single-family home which he owns is not occupied or designed to be occupied by him.

The Code's all-inclusive definition of plumbing prohibits everyone else from engaging in even quite simple plumbing and plumbing repair work, and subjects violators to criminal penalties. It is especially restrictive in prohibiting both non-occupying home owners, such as appellant, and resident non-owners (even those who have the owner's permission) from engaging in plumbing (as defined in the Code) on their own premises unless and until they become qualified as commercial plumbers by passing an examination and paying a fee. (The Code is silent on the examination's content.) These stern restrictions are imposed even though the pervasive supervisory provisions of the Code see to it that all plumbing done will meet the standards of the Code, so that whether the work is done by an "occupying home owner" or a commercial plumber, the result will be uniformly good.[2]

The record demonstrates Appellant's willingness to comply with all requirements of the Uniform Code in

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2. On this point, the trial record includes the following testimony by Appellee Cook:

Question: In your inspections is there a difference in the quality of a contractor's work and a home owner's work?

Answer: No, sir.

Question: When a job is done, and inspection made, and the work approved, the job meets the specifications of the code, is that right?

Answer: That is right. (Statement of Facts, R. 0075).

question making sure of a safe and healthy plumbing result. Consequently, health is not an issue in this case. (Statement of Facts, R. 0078). Rather, the case includes the narrow issue whether the requirement that a person who owns a single-family home, in order to belong to the exempt class, must occupy the home or it be designed to be occupied by him, is rationally related to public health, safety or welfare.

In raising this issue Appellant does not want to turn back the clock to another day when economic legislation fell victim to restrictive judicial concepts of society's power to protect itself. Appellant presents no sweeping challenge to plumbing codes in general and this Uniform Plumbing Code in particular. This Court is faced with a limited issue which arises within the context of the restrictive rules announced by it to govern its review of economic legislation.

In viewing such issues the Supreme Court of the United States has returned to the original constitutional proposition that Courts do not substitute their social and economic views for the judgment of legislative bodies who are elected to pass state laws.[3] *Ferguson v. Skrupa*, 372 U.S. 726 at 730 (1963). There is no question that

3. However, it is submitted that restrictive legislation of the type under review here, pushed by a coalition of plumbing contractors, master plumbers, journeyman plumbers to preserve their monopoly and who, but for the fact that the monopoly has been granted by legislative fiat, c.f. *Eastern R.R. Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961), rather than gained by strikes and boycotts, c.f. *Allen Bradley Co. v. Local No. 3, I.B.E.W.* 325 U.S. 797 (1945), would be engaged in conduct violating the antitrust laws, deserves a very close look by the judiciary.

the equal protection clause of the Fourteenth Amendment admits of the exercise of a wide scope of discretion in statutory classifications and avoids what is done only when it is without any reasonable basis and is purely arbitrary. *Morey v. Doud*, 354 U.S. 457 at 463 (1957). Likewise, any classification having some reasonable basis does not offend against the same clause merely because it is not made with mathematical nicety or because it results in some inequality. *Ibid.* Nor, as this Court has said, is a law unconstitutional if it results in some discrimination, so long as it is not an invidious discrimination. *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955).

Along with this development, this Court at the same time has laid down broad but fundamental propositions that clearly deny a legislative body the power to erect statutory classifications which are not relevant to the ostensible end sought by the legislation. *Morey v. Doud*, 354 U.S. 457 (1957).

The professed end sought by this Uniform Code is the achievement of health, welfare and safety. This objective is boldly stated in the Preamble to the Code. The only evidence in the record linking health, welfare and safety with the classification feature is the testimony that commercial plumbers tend to do plumbing work somewhat more carefully than non-commercial

plumbers in Snohomish County. The majority of the Supreme Court of the State of Washington apparently looked to this evidence when it commented that "licensed plumbers generally do better work than do non-licensed plumbers," and relied upon the greater administrative convenience in supervising licensed plumbers to meet due process standards. (See Appendix, p. 5a). Administrative convenience might be a rationale for establishing a distinction between commercial plumbers and non-commercial plumbers, but it furnishes no reason for distinguishing between occupying and non-occupying home owners. The latter is the classifying distinction that the statute seeks to establish, and which is the subject of this appeal.

Apart from the evidentiary aspects of the case the majority of the Supreme Court of the State of Washington, without the support of any evidence, hinged its opinion upon the assumption that a resident would do a more careful job because he would be more motivated to protect himself and his family than the non-resident. But, the hard fact remains that this assumption relied on by the Supreme Court of the State of Washington is not consistent with the classification established by the Code, as the Code also clearly prohibits a resident non-owner, unless he obtains a plumbing contractor's license, from plumbing the premises in

which he resides. So residence does not form the legislative basis for the classification.[4]

It is self-evident that all plumbing work has an impact upon the public. This is so, whether it be done by an occupying or non-occupying owner. But to conclude as the majority opinion does that a non-occupying owner has similar impact upon the public to a commercial plumber because he is doing plumbing for others is not a tenable argument. Whether it be plumbing of occupiers or non-occupiers, others will use the plumbing while the occupier lives in the house and after he disposes of it.

The point of all this is that a search of the trial record and the section of the Code setting out the occupying—non-occupying distinction establishes the meaningless and arbitrary nature of the distinction. As is pointed out in the dissenting opinion of the Supreme Court of the State of Washington:

> "An owner may obtain a permit to do his plumbing work in compliance with the Code, live in the house for a time, be it ever so short, and then sell or lease it to others. In no material respect would such an owner differ from one who, from the beginning, plans to rent his house to others and who per-

4. Section 1.10(c) of the Code sets out the legislative basis for the classification in terms of a dwelling occupied by or designed to be occupied by the owner. (Underlining supplied.)

sionally performs identical work with full Code compliance." (See Appendix, p. 9a).

The actual experience under the Code, as shown by the uncontradicted testimony in the trial record is that the comprehensive requirements of the Code have compelled a healthy plumbing result, no matter who does the work. Mr. Alexander Gyorog, the leading proponent of the challenged Code in Snohomish County, and a master plumber, stated that if these Code provisions are followed, a high-quality condition will result. (Statement of Facts, R. 0081). Code supervision features include the preliminary requirement that all plumbing plans must be submitted to the administrative authority for approval (Section 306, Appendix, p. 39a). The Code provides for careful inspection of all authorized plumbing work (Section 1.4, Subsection 3, Appendix, p. 35a). The administration even determines whether the materials are satisfactory (Section 1.4, Appendix, p. 35a). Plumbing codes are generally offered in the name of health, safety and welfare; but the obstinate fact remains that in this particular instance whether the work be done by occupying owner or non-occupying owner, a healthy result is assured. All of this demonstrates that the limited exception in this Uniform Code in favor of occupiers is unrelated to the object sought, as the classification between occupiers and non-occupiers of single-

family dwellings is wholly unrelated to health or safety.

Why then was this exception drawn so narrowly to exclude owners of land who are non-occupants like Appellant? This Code is the product of a commercial combination made up of plumbing contractors, master plumbers and journeyman plumbers who have given themselves a monopoly privilege enforced by criminal law sanctions created to serve the objectives of a special-interest group. The inescapable effect of this privilege is to prevent an owner of a single-family house, for reasons unrelated to health or welfare, from fixing up plumbing in a dwelling which he owns. No one quarrels with the right of the commercial plumbing community to make a living, but the privilege granted by this statute goes beyond such a fundamental economic right. Fanciful and non-existent health ills should never be a shield to foster economic entities. As was said by this Court in *Morey v. Doud*, 354 U.S. 457 at 468 (1957), a class should not be established by statute on an arbitrary basis to give an economic advantage to those engaged in a given business.

The Questions Are of Public Importance

The case concerns a Uniform Plumbing Code first offered by the Western Plumbing Officials of Los Angeles, California. New editions of the Code have been published from time to time. The Snohomish County

Code before the Court is the 1961 Code. The particular section being reviewed, namely Section 1.10(a) and (c) is unchanged in the 1964 and 1967 Codes.

All or portions of the provisions of this code have been adopted by governmental bodies in the following ten states: Missouri, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Montana, Idaho, Washington and California. It is presently under consideration in Arizona. The Code and the related Federal constitutional issues have been before *nisi prius* Courts in California, Montana and Washington. The Washington cases are two in number. The first is *State v. Randall* and the second is this appeal. In *Randall*, Judge Ryan of the Kitsap County Superior Court felt that the same restrictive classification section of the same Uniform Code raised unanswered Federal Constitutional questions and dismissed the criminal prosecution brought under it. Judge Ryan's opinion is included in the Appendix herein. (See Appendix, p. 27a-33a). That there was considerable interest in *Randall* is evidenced by the filing of an *amicus curiae* brief by the Kitsap Master Plumbers Association.[5] The *amicus* brief is discussed by Judge Ryan in his opinion. (See Appendix, p. 32a). *Randall*, of course, was not appealed to the Supreme Court of the State of Washington, whereas the current case (*Rhodes*) was. To appellant's knowledge, *Rhodes*

5. Referred to by Judge Ryan as ". . . certain persons interested in bringing about the conviction of the defendant." Appendix, p. 32a.

is the singular instance in which litigation involving the constitutionality of the section of the Uniform Plumbing Code, which is so widespread in the West, has been appealed to an appellate court.

Conclusion

The Code Section contested discriminates invidiously against home owners such as Appellant, and for the reasons stated above the judgment of the Supreme Court of the State of Washington should be reversed. The distinction created by the Code Section has no rational basis. The questions presented by this appeal are substantial and of public importance. The case deserves plenary consideration and probable jurisdiction should be noted.

Respectfully submitted,

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